

## Covid-19 Emergency Response – Employment Frequently Asked Questions for NGOs in Hong Kong

1. *If our employees/ volunteers work from home that results in the loss / misplacement of client data or other confidential information, what would be the liabilities for our organization, if any?*

Employees who work from home will still be considered to be providing services in the course of employment. Any loss of client data or breach of confidentiality can therefore still lead to liability on the part of the employer in the same way as if the employee were working from the office.

2. *What kind of health data can we collect from the employees and our service users? What are our obligations in collecting and storing such data?*

Temperature checks are generally permissible. In order to require employees to undergo a full medical check, there would need to be a contractual ability to do this in the employment contract.

In both cases, as this will amount to personal data for the purposes of the Personal Data (Privacy) Ordinance, you should inform the employee/service user in advance and the purposes for which this data will be used i.e. to determine whether there is any risk to health and safety, or to prevent the spread of infection.

There is no strict requirement to obtain consent provided the employee/service user is notified of these purposes in advance, but we recommend you do so as this amounts to sensitive personal data. You should also check if the terms of the Personal Information Collection Statement issued to employees/service users is sufficiently wide to cover these purposes.

3. *If our employees' job nature cannot be fulfilled from home, is it okay if we ask them to take annual leave days or reduce working hours? What are the legal implications behind such measures?*

Whether employees can be asked to take annual leave depends on whether the annual leave is statutory or contractual:

- Statutory annual leave - you are generally free to determine the dates on which your employees must use their statutory paid annual leave provided you have: (i) consulted with them in advance; and (ii) given not less than 14 days' written notice. There is no definition of what amounts to sufficient "consultation" – provided you have entered into some form of dialogue with employees and allowed them some time to consider their views, this should be sufficient.

- Contractual annual leave – how such leave is to be taken is subject to the terms of the employment contract/applicable company policy.

In terms of reducing working hours, the general position at law is that employees have an implied right to work and employers cannot ask them to stop working without their consent in the absence of a contractual or statutory right to do so.

Reduced working hours (providing less work for less pay) would give rise to potential claims for breach of contract, constructive dismissal and/or failure to pay wages (which is a criminal offence) if it is unilaterally imposed by an employer.

However, a reduction of working time and salary can be implemented with the express consent of the employee. We recommend that any such consent be carefully documented to avoid later dispute as to what was agreed.

4. *What are our obligations when an employee is sick, or under government-ordered quarantine?*

If employees are issued with a medical certificate (either after having tested positive or having been placed "under medical surveillance"), they should be treated as being on sick leave. They should receive sickness allowance in accordance with/subject to the eligibility requirements set out in the Employment Ordinance (80% of the employee's daily average wage and subject to other eligibility requirements) and/or the terms of their employment contract/company policy.

If they are not issued with a medical certificate, they should generally continue to be paid their normal wages in full. Although this is not expressly provided for under Hong Kong law, the Labour Department is encouraging employers to show compassion and flexibility. If the employees are not sick and are otherwise ready and willing to work, it would be prudent to continue to pay wages during the quarantine period. Home working should be considered where possible.

Please note that an employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct. An employer who contravenes the above provision is liable to prosecution and, upon conviction, to a fine of HK\$100,000.

5. *What are our obligations to the employees who are vulnerable to contracting COVID-19 or have caregiving responsibilities when the schools are closed?*

Under the Occupational Safety and Health Ordinance (Cap. 509) (the "OSHO"), employers are required to as far as reasonably practicable, ensure the safety and health at work of all employees.

What an employer reasonably needs to provide to comply with the OSHO depends on the circumstances but if certain employees are known to be more vulnerable to Covid-19, employers may wish to provide masks to them and minimise their



exposure to other colleagues in the workplace or even consider allowing them to work from home.

6. *Can we ask our employee not to take on personal travel?*

An employer's request to an employee to not travel to a region which is known to have a high risk of Covid-19 infection is likely to be considered reasonable compared to a blanket restriction against all travel.

However, you must also ensure that employees are allowed to take their statutory annual leave, as this cannot be forfeited except in very limited circumstances.

7. *If we need to hire a new employee on a temporary contract for 6 months, would this person be eligible for applying the funding under the Employment Support Scheme (ESS)? What is our obligation under ESS?*

For employers who have applied for the first tranche of the ESS, the funding received depends on the month that they elected for calculation of subsidies (this could be December 2019, January 2020, February 2020 or March 2020).

Hiring an additional employee any time after 31 March 2020 does not result in an increase in the subsidies that are disbursed to the employer. However, such an employee can go towards satisfying any headcount shortfall under the circumstances described below.

Employers who apply for the ESS have an obligation to maintain their headcount as it was in March (as shown in the MPF records) and also undertake that they will not make any employees redundant, in both cases during the subsidy period (June to November 2020).

If an employee resigns after March 2020, the employer's headcount will fall and any new employees hired (provided that such employees meet the criterion of "regular employee" and appear on the MPF records for the applicable month) can help meet the shortfall in headcount.

*We thank DLA Piper for providing the answers to these questions.*

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